



**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**HYUNDAI MOTOR
MANUFACTURING ALABAMA, LLC,**

Petitioner,

v.

**NATIONAL LABOR RELATIONS
BOARD,**

Respondent.

CASE NO. _____

PETITION FOR REVIEW

Petitioner Hyundai Motor Manufacturing Alabama, LLC, a Foreign Limited Liability Company with its principal place of business in Montgomery, Alabama, by and through its undersigned counsel, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, and hereby petitions this Court to review and to set aside the Decision and Order of the National Labor Relations Board in Case No. 15-CA-173419, which was entered on August 20, 2018, and reported at 366 NLRB No. 166, on grounds, including without limitation, it is contrary to law and lacks substantial evidence supporting the findings. A copy of the National Labor Relations Board's Decision and Order to be reviewed by this Court is attached as Exhibit "A."

Respectfully submitted this the 11th day of September, 2018.

s/ Marcel L. Debruge

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following via Overnight Mail on this the 11th day of September, 2018:

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Exhibit A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Hyundai Motor Manufacturing Alabama, LLC and
Richard P. Rouco. Case 15-CA-173419**

August 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On March 6, 2017, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions,

¹ There are no exceptions to the judge's dismissal of the allegation that the Respondent threatened employees with termination for talking about unions.

² We agree with the General Counsel that the judge abused his discretion in narrowing the scope of the General Counsel's subpoena duces tecum relating to documents of the Respondent's management officials that pertain to their knowledge of employees' suspected union activity. The subpoenaed documents relate to matters in this case and potentially deprived the General Counsel of evidence of the Respondent's antiunion animus and its knowledge of the employees' suspected union activities. Nonetheless, in the circumstances here, we decline to remand the case to the judge because we find that the present record is sufficient to find that the Respondent violated Sec. 8(a)(1) by terminating Cleckler, Howard, and Yarbrough. Members Pearce and Emanuel find that the Respondent violated Sec. 8(a)(1) because it terminated these employees for engaging in protected concerted activity. Members Pearce and McFerran find that the Respondent violated Sec. 8(a)(1) because it terminated the three employees because it believed they engaged in such activities. Therefore, we are able to resolve these allegations without remanding the case, and it is unnecessary for us to pass on the other allegations for which the subpoenaed documents are relevant, i.e., that the Respondent discharged the employees because it mistakenly believed they assisted a labor organization and in order to discourage employees from engaging in activities on behalf of labor organizations. Finding these additional violations would not materially affect the remedy.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

and to adopt the recommended Order as modified and set forth in full below.⁴

We agree, for the reasons stated by the judge, that the Respondent violated Section 8(a)(1) of the Act by terminating employees Justin Cleckler, Nathan Howard, and Nathan Yarbrough for their protected concerted activity on December 22, 2015, when they left work at the time on the posted work schedule instead of following a supervisor's oral instruction given to them 2 days earlier to leave work an hour later.⁵ First, the judge properly rejected the Respondent's claim that the employees, who continued working and remained employed by the Respondent for another 2 weeks after December 22, voluntarily resigned on December 22. Second, the General Counsel presented documentary evidence that, on four separate occasions from August 2013 through May 2016, the Respondent had disciplined other employees—but not terminated them—for committing the same infraction of leaving work early without authorization. In another instance, in September 2013, the Respondent had a discussion with an employee who left work early without notifying a member of management, but did not take any corrective action against him. Nonetheless, the Respondent decided, without explanation, to treat Cleckler, Howard, and Yarbrough differently.

We also agree with the judge's finding that the Respondent, through Team Relations Specialist Gregory Gomez, violated Section 8(a)(1) by unlawfully interrogating Cleckler, Howard, and Yarbrough about whether they talked with each other before they left at 2 p.m. on December 22. See *Rossmore House*, 269 NLRB 1176, 1177–1178 & fn. 20 (1984), *affd.* sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Employers may lawfully question employees as part of a lawful investigation into facially valid claims of misconduct, even if the alleged misconduct took place during the exercise of Section 7 rights, provided they do not impermissibly pry into the employees' protected or union activity. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528–529 (2007). Here, we agree with the judge that Gomez' question was unlawfully coercive because (1) it unnecessarily delved into the employees' potentially protected conduct by directly

⁴ We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997) (holding that the contingent notice-mailing date in the order's notice-posting paragraph should correspond with the date of the first unfair labor practice). We shall substitute a new notice to conform to the Order as modified.

⁵ Member McFerran finds it unnecessary to pass on whether the employees engaged in protected concerted activity because she agrees that the Respondent unlawfully discharged them because it believed they did, as discussed below.

inquiring into whether they had acted concertedly; (2) the questioning took place in the human resource representative's office and in the presence of Group Leader Terrence Brooks; (3) the interview laid the groundwork for disciplinary action; and (4) it prompted two of the three employees to provide an untruthful or evasive answer. Moreover, Gomez questioned the employees about their concerted actions even though the Respondent knew that they shared the same objection to Brooks' change to their schedule, and decided to terminate the employees despite learning through Yarbrough's response that their early departure was concerted.

Finally, we find, as an alternative rationale for the 8(a)(1) discharge violation, that the Respondent terminated Cleckler, Howard, and Yarbrough because it believed they engaged in protected concerted activity, regardless of whether they actually did so.⁶ See *U.S. Service Industries, Inc.*, 314 NLRB 30, 30-31 (1994) (quoting *Monarch Water Systems, Inc.*, 271 NLRB 558, 558 fn. 3 (1984)), enf'd. 80 F.3d 558 (D.C. Cir. 1996). As discussed above, the Respondent's unlawful coercive interrogation of each employee about whether they had discussed clocking out early with one another, and Yarbrough's response that they had, evinces the Respondent's belief that the employees engaged in a concerted protest. The Respondent's belief that the employees acted in concert is further shown by Brooks and Cleckler's interaction the morning after the employees' 2 p.m. departure. Brooks asked Cleckler why the employees had left early and Cleckler responded by saying "*we didn't leave early, we went by our schedule*" (emphasis added). Further, we rely on the Respondent's human resources department memo to its employee review committee, which made the decision to terminate the employees, because the memo shows, as the judge found, that the Respondent "treated the walkout as a group action, not as three individual acts" and "suspected there was some degree of collusion before the walkout, rather than believing that the 3 independently decided to walk off the job at the same time." The memo discusses the employees' action as a single organized decision and concludes by referring to the employees acting in unison: "[T]he three MTMs [maintenance team members Cleckler, Howard, and Yarbrough] felt the written schedule took precedence over the verbal guidance provided by Toby [Brooks]" and "[t]he three TMs [team members] that clocked out early did not try and get clarification . . . before clocking out . . ."

⁶ Member Emanuel finds it unnecessary to pass on whether the Respondent discharged the employees because it believed they engaged in protected concerted activity, as such finding would not affect the remedy.

The facts also show that the Respondent believed the employees were acting for their mutual aid and protection. The human resource department memo shows the Respondent believed the employees were acting together because they were frustrated with the schedule change. The memo quotes Brooks' report that "[t]he Team Members didn't like that Tuesday was 6:30 am-3:00 pm and told me that wasn't what was on the sheet on the board . . ." and "[o]n Monday [December 21] they followed the schedule, but on Tuesday [December 22] they chose to work the schedule they wanted to work." The Board has found that employees are protected by the Act when they refuse to work an additional hour on a single occasion because of an employer's apparent inconsistency in its scheduled hours. See *Mike Yurosek & Son, Inc.*, 310 NLRB 831, 831-832 (1993). Therefore, based on the evidence above, we find that even if the employees did not in fact act in concert to protest their schedule, the Respondent believed they did. Accordingly, it violated the Act by discharging the employees based on this belief.⁷

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having

⁷ Applying *Wright Line*, we reach the same conclusion that the Respondent unlawfully discharged the employees because it believed they engaged in protected concerted activity. See *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *U.S. Service Industries*, supra, at 31. For the reasons just discussed, regardless of whether the employees engaged in protected concerted activity, we find that the General Counsel made a sufficient showing to support the inference that the Respondent believed that Cleckler, Howard, and Yarbrough engaged in protected concerted activity, and that this belief was a motivating factor in the Respondent's decision to terminate them. We find animus towards employees' protected concerted activity based on the contemporaneous unlawful interrogation and on the Respondent's disparate treatment of these employees compared to other employees who had left work early, as discussed above. See *Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3 (2018) (disparate treatment evidence of animus); *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 3 (2016) (contemporaneous unfair labor practices evidence of animus). Finally, we find that the Respondent failed to show that it would have terminated the employees in the absence of its belief that they had engaged in protected concerted activity. In particular, the Respondent did not show why it terminated these employees, but not others, for leaving work early. Further, the Respondent did not provide any other reason that would lead us to believe that it would have discharged the employees absent its belief in their protected concerted activity. For instance, the employees' disciplinary history, which varied greatly, does not explain their discharges, and we agree with the judge that the employees, who continued working and remained employed by the Respondent for another 2 weeks after December 22, did not voluntarily resign on December 22.

found that the Respondent unlawfully terminated Justin Cleckler, Nathan Howard, and Nathan Yarbrough, we shall order the Respondent to offer them reinstatement and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall also order the Respondent to compensate Nathan Yarbrough, Nathan Howard, and Joseph Cleckler for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 1 fn. 2 (2016), enf. in pertinent part 859 F.3d 23 (D.C. Cir. 2017). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, we shall require the Respondent to compensate Justin Cleckler, Nathan Howard, and Nathan Yarbrough for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Hyundai Motor Manufacturing Alabama, LLC, Montgomery, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) Coercively interrogating employees about their protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Justin Cleckler, Nathan Howard, and Nathan Yarbrough full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Justin Cleckler, Nathan Howard, and Nathan Yarbrough whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Justin Cleckler, Nathan Howard, and Nathan Yarbrough for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify Justin Cleckler, Nathan Howard, and Nathan Yarbrough in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Montgomery, Alabama facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current em-

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees and former employees employed by the Respondent at any time since December 23, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activity.

WE WILL NOT coercively interrogate you about your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Justin Cleckler, Nathan Howard, and Nathan Yarbrough full reinstatement to their former jobs or, if

those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Justin Cleckler, Nathan Howard, and Nathan Yarbrough whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Justin Cleckler, Nathan Howard, and Nathan Yarbrough for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and WE WILL, within 3 days thereafter, notify Justin Cleckler, Nathan Howard, and Nathan Yarbrough in writing that this has been done and that the discharges will not be used against them in any way.

HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC

The Board's decision can be found at www.nlrb.gov/case/15-CA-173419 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Andrew T. Miragliotta, Esq., for the General Counsel.
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Richard P. Rouco, Esq. (Quinn, Conn, Weaver, Davies & Rouco, LLP), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Montgomery, Alabama on January 23 and 24, 2017. Richard P. Rouco, an attorney, filed the initial and

amended charges on April 7, April 21, and May 25, 2016. In those documents he alleged that Respondent had terminated Nathan Howard, Justin Cleckler,¹ and Nathan Yarbrough on January 11, 2016, because they engaged in protected concerted activity and/or union activity.

The General Counsel issued the complaint on July 29, 2016. In it he alleged Respondent terminated Howard, Cleckler and Yarbrough in violation of Section 8(a)(1) because it believed that the three engaged in protected concerted activity and because it mistakenly believed they had assisted a labor organization in violation of Section 8(a)(3) and (1). The General Counsel also alleges that Respondent, by Group Leader Terrence "Toby" Brooks, violated Section 8(a)(1) by threatening employees with termination for talking about unions. Further it alleges that Team Relations Specialist Gregory Gomez illegally interrogated employees about the protected concerted activities of themselves and others.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures automobiles at a very large factory located just south of Montgomery, Alabama. It annually sells and ships goods valued in excess of \$50,000 from this facility to points outside of Alabama. It also annually purchases and receives goods at the Montgomery plant which are valued in excess of \$50,000 directly from points outside of Alabama. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent's discharge of Howard, Cleckler and Yarbrough

Nathan Howard, Justin Cleckler, and Nathan Yarbrough were maintenance employees in the paint shop at the Montgomery plant. Much of the painting work is performed by robots which are serviced by the maintenance employees. Respondent has 4 maintenance crews in the paint shop which work different schedules. Howard, Cleckler, Yarbrough, Levado Lawson, and Robert Steele were the 5 members of the D shift crew. They normally worked Friday, Saturday, Sunday and Monday from 6 a.m. to 4:30 p.m.²

Production of automobiles at the Montgomery facility stops for maintenance work twice a year. One of these shutdowns normally occurs in the Christmas to New Year timeframe. In late November 2015, Soladine Harris, the paint shop maintenance manager, posted a work schedule for the shutdown period. He posted a revised schedule in early December which indicated that Tuesday, December 22, and Wednesday December 23 would be production days and that the shutdown would start on Thursday, December 24. According to this schedule,

the D shift crew was to be working from 6 a.m. to 2 p.m. from December 22 through Saturday January 2, 2016.³

On December 6 & 7, 2015, Toby Brooks, a Group Leader on the day shift,⁴ had each D crew member sign a form acknowledging that they would be working day shift hours during this period. On Sunday, December 20, Brooks informed all the D shift members that they were to clock in at 6:30 a.m. instead of 6 and clock out at 3 p.m. instead of at 2 p.m. on Tuesday December 22. He told this to each of the crew members individually.

Several responded that the printed schedule still indicated they were to work from 6 a.m. to 2 p.m. Changes to the posted schedule are normally made by Soladine Harris, not Brooks. Brooks did not inform Harris, who is his manager, that he was telling the D shift to work a different schedule. None of the three alleged discriminatees made any effort to clarify their conflicting schedules with Harris or anybody else, prior to Wednesday, December 23.

On December 22, all 5 of the D crew members clocked in at 6, which was consistent with the printed schedule, not Brooks' oral instructions. Sometime afterward, Howard, Yarbrough and Cleckler discussed the fact that the written schedule had not been changed (Tr. 168).⁵ At 2 p.m., Cleckler, Howard and Yarbrough clocked out and left the plant, also consistent with their printed schedule, but inconsistent with Brooks' orders. At about 2:30 Steele and Lawson, the other members of the D shift crew, came to Brooks and asked where the rest of the crew had gone. Brooks told Steele and Lawson that they must work until 3. They did so.

The next morning, Brooks asked Cleckler why the 3 left work early.⁶ Cleckler responded that the employees did not leave early; they had worked in accordance with their printed schedule. He then went to the office of Gregory Gomez, a team

³ It appears that not every D shift employee was scheduled to work every day during this period.

⁴ Brooks is a statutory supervisor.

⁵ Although Nathan Howard told Gregory Gomez that he did not talk to Cleckler and Yarbrough beforehand, Gomez's question and Howard's answer are ambiguous. His answer indicates that there was no discussion between Howard, on the one hand, and Cleckler and/or Yarbrough immediately before clocking out. I conclude that Howard's testimony is not inconsistent with Yarbrough's testimony, which I credit. Moreover, to the extent there is a conflict between the testimony of Yarbrough and Howard, Yarbrough's testimony is inherently more probable, *Coeburn Garment Co.*, 276 NLRB 1481, fn. 1 (1985).

In this regard, Respondent's brief at p. 19, par. 31, is inaccurate in characterizing Nathan Yarbrough's testimony at Tr. 168, lines 13-23.

Yarbrough was asked what time he reported on December 22. Then he was asked if he saw other D shift employees when he clocked in. Next he was asked, "On that day, did you discuss with any coworkers what time you would be clocking out?"

Sometime during the day, me, Justin, and Nathan talked about the written schedule on the board not being changed, still saying 6 to 2 p.m.

Yarbrough's testimony is consistent with what he told Gomez on December 23, 2015.

⁶ Yarbrough and Cleckler testified that Brooks' inquiry was couched in the plural, i.e., why did "we" leave early. Howard testified that Brooks asked why *he* left early.

¹ Cleckler's first name is Joseph, but he goes by Justin.

² Howard had a slightly different schedule, 0400 to 2:30 p.m.

relations representative, who was assigned to the paint shop.⁷ Cleckler raised the inconsistency between the printed schedule and Brooks' orders. Asking checking with Brooks, Gomez contacted his superiors in team relations. Barry Jackson, an assistant manager, who is Gomez's immediate superior, instructed him to write up a series of questions and interview Cleckler, Howard, and Yarbrough separately. Gomez also interviewed Toby Brooks who was present when Gomez interviewed the three alleged discriminatees on December 23.

Brooks told Gomez that, "the team members didn't like that Tuesday was 6:30-3 pm and told me that wasn't what was on the sheet on the board and I explained to them that the schedule on the board reflected the shutdown schedule and they would start working 6 am -2 pm on Wednesday, when the shutdown officially started." (GC Exh. 5(a).)

Gomez asked Howard, Yarbrough and Cleckler 7 identical questions (GC Exh. 5(a); R. Exh. 7) and wrote down the answers given by the three alleged discriminatees. They each signed a sheet with the answers recorded by Gomez. Gomez asked when Brooks discussed the written schedule versus his guidance. Cleckler answered that Brooks told him about the December 22 schedule on Sunday, December 20. Further he told Gomez, "I argued about the written schedule verses Toby's guidance. Nothing was said after that discussion." (GC 5(a), p. 3.)

When asked if, "you and Nathan Howard and Nathan Yarbrough discussed leaving at 1400 before you left" (Exh. R-7), Cleckler gave the nonresponsive answer that he had pointed out to Brooks that the schedule said 6 to 2.

Yarbrough's response to the identical question concerning communication with Howard and Cleckler before clocking out, was, "Yes, we decided to follow the written guidance." Howard's answer was, "I did not talk to them beforehand. I just clocked out."

On December 28, 2015, Gomez submitted his typed report to assistant manager Barry Jackson. Cleckler and Yarbrough continued to work doing their normal duties until January 11, 2016. Howard worked until January 4, when he went on medical leave for shoulder surgery.

On January 11, 2016, Respondent gave each of the 3 employees an identical termination letter stating that pursuant to Respondent's policies and handbook, each one had voluntarily resigned their employment by leaving at 2 p.m. on December 22, 2015. (GC Exhs. 7, 9, and 10).

On January 14, Cleckler sent an email to Respondent in the nature of an appeal of his discharge (R. Exh. 11). He received no response (Tr. 130).

Neither Gomez, nor Brooks nor Soladine Harris played any role in the decision to terminate Cleckler, Howard and Yarbrough. This decision was made by an employee review committee composed of higher level managers. There is no evidence in this record regarding the deliberations of that committee and no evidence that the committee considered anything other than the report prepared by Gomez and Barry Jackson's summary of that report. The committee clearly treated the 3 as

a group. There is no indication that any consideration was given to the disciplinary records of the 3; Cleckler (no prior discipline); Yarbrough (1 prior counseling for clocking in early) and Howard (11 minor disciplines and 1 major discipline).

Analysis

There is no evidence that any of the alleged discriminatees engaged in any union activity or that any of Respondent's managers suspected that any of them did so. However, some of Respondent's managers were aware of union efforts to organize the plant as early as Thanksgiving 2015. Since Toby Brooks was aware of union activity by then (Tr. 334), I conclude other managers were aware of this as well.

In light of the lack of union activity on the part of Howard, Cleckler and Yarbrough, the issue in this case is whether they engaged in protected concerted activity by walking off the job at 2 p.m. on December 22, 2015, and/or whether Respondent believed they did so.

As a preliminary matter, I reject Respondent's contention that the 3 voluntarily resigned. They had no intention of abandoning their jobs as evidenced by the fact that they reported for work on time on December 23 and worked their assigned hours and performed their assigned duties until January 11, 2016, in the case of Cleckler and Yarbrough and until January 4, in the case of Howard. The 3 didn't resign, regardless of what Respondent's handbook says (GC Exh. 3, p. 00035), Respondent fired them.⁸ Indeed, Respondent's rules would lead one to the conclusion that any protected strike constitutes a voluntary resignation.

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging an employee because they engaged activity protected by Section 7 is a violation of Section 8(a)(1).

Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . (Emphasis added)"

In *Meyers Industries (Myers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991), that in order to present a prima facie case that an em-

⁷ Team Relations is part of Respondent's human resources operation.

⁸ Cleckler's unanswered email to Respondent after his termination, R. Exh.-11, is further evidence that the discriminatees did not intend to resign. It also establishes that Respondent's Open Door Policy, GC Exh. 3, p. HMMA 00046-47, is in no way the equivalent of a collectively bargained grievance procedure. Thus, the fact that the 3 discriminatees did not avail themselves of the Open Door Policy, does not, contrary to Respondent's assertion at p. 35 of its brief, weigh against finding their walkout to be protected.

ployer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

I find that the walkout by Howard, Cleckler, and Yarbrough meets all the criteria of protected concerted activity. They walked out of the plant at the same time for the same reason, the oral change in their working hours for December 22.⁹ The change in their hours is a working condition subject to Section 7, and indeed is specifically mentioned in Section 9(a) in setting forth the authority of a collective-bargaining representative. Brooks, a supervisor and agent of Respondent, knew beforehand that the D shift crew was unhappy with the change and understood why they left early regardless of the fact that it was not articulated to him on December 22. They were not required to make a specific demand beforehand that their work hours conform to Respondent's printed schedule in order for their walkout to be protected, *Washington Aluminum v. NLRB*, 370 U.S. 9, 14–15 (1962); *Polytech Inc.*, 195 NLRB 695 (1972).

Polytech, supra, was decided on very similar facts to the instant case. Five unrepresented employees walked off the job at the same time in contradiction of the direct orders of their employer. These employees expressed their unwillingness to work overtime to the employer individually, not in a group setting.

Mike Yurosek & Sons, Inc., 310 NLRB 831 (1993); 306 NLRB 1037 (1992), was also decided on similar facts. The employees in that case punched out at the same time in contravention of their supervisor's orders to work an extra hour compared to a prior schedule.

As noted previously, the Board in *Myers Industries*, set forth the test for concerted activities in the disjunctive; "engaged in with or on the authority of other employees." Thus, even if the 3 employees walked off the job together without prior communication, their conduct was concerted. Also, it is important to note that Respondent treated the walkout as a group action, not as three individual acts (GC Exh. 5), *Mike Yurosek & Sons, Inc.*, supra.

Moreover, as stated before, I find that on December 22, the three did discuss the fact that the written schedule had not been changed. Also, I infer that Respondent suspected there was some degree of collusion before the walkout, rather than believing that the 3 independently decided to walk off the job at the same time. If that were not the case, Gomez would not have asked each one if they had talked to others before punching out.

I give no weight to the answers given by the alleged discriminatees to questions posed by Respondent's counsel as to whether they were protesting anything or going on strike. Employees' subjective characterization of their actions is not determinative in the Board's objective analysis of whether the employee has engaged in protected concerted activity, *Mike*

Yurosek & Sons, Inc., 310 NLRB 831, 832 (1993). It is absolutely clear that the employees in this case left because they were unhappy with the oral change to their schedule and that Respondent knew that. Viewed objectively, their actions were a work protest and a strike. In conclusion, I find that Respondent violated Section 8(a)(1) in terminating Howard, Cleckler, and Yarbrough on January 11, 2016.

Alleged Threat by Toby Brooks (complaint paragraph 6)

Nathan Howard testified that on December 23, he argued with Toby Brooks as to whether he clocked out earlier than he was supposed to. Howard then testified that he said that, "if we had a union up in here this kind of stuff would be over with by now" (Tr. 218, 244). According to Howard, Brooks replied, "I told you don't say the word union in this plant. It will get you fired." Brooks denied that this exchange ever took place (Tr. 315–316). I credit Brooks and dismiss this complaint allegation. Howard's bringing up a union in this context strikes me as very contrived since their dispute concerned whether Brooks, rather than Soladine Harris, had authority to change the written work schedule. Whether Respondent was unionized does not appear to me to have any relationship to what Howard and Brooks were discussing.

Alleged Illegal Interrogation by Gomez (complaint paragraph 7)

Gregory Gomez interviewed Howard, Yarbrough and Cleckler on December 23 and asked each one of them 7 identical questions, including whether they talked to each other before walking off the job at 2 p.m. Whether an interview/interrogation violates Section 8(a)(1) of the Act depends upon whether it reasonably tends to restrain or interfere with employees' exercise of their rights under Section 7 of the Act, *Spartan Plastics*, 269 NLRB 546 (1984).¹⁰ The Board also regularly applies the "Bourne" factors in determining whether questioning is coercive. These factors are (1) the background (i.e., hostility and discrimination); (2) Nature of the information sought, e.g., seeking a basis for disciplinary action; (3) Place of the Questioner in the company hierarchy; (4) Place and Method of Interrogation and (5) the Truthfulness of the replies.

While I find that Respondent had a legitimate interest in finding out the circumstances under which Howard, Yarbrough, and Cleckler left work at 2 p.m., there was no legitimate reason for Gomez to ask whether they had consulted each other, a question which delved into protected conduct. Moreover, the circumstances of the inquiry were likely to be intimidating in that the discriminatees could well have viewed the interview by Gomez in his office, in the presence of Brooks, as laying the groundwork for disciplinary action—which it was in fact. Indeed, the subject of Gomez's report to his superiors, "Alleged Insubordination and Leaving Without Authorization," establishes that Gomez's interviews were seeking a basis for disciplinary action (Exh. GC-5(a)). The fact that Gomez researched the disciplinary records of the 3 is further evidence of this fact.

⁹ The Board in *Electromec Design & Development Co.*, 168 NLRB 763, 771 (1967), cited by Respondent at page 25 of its brief, adopted the following conclusion of the Judge, "That the walkout was the result of concerted action is not seriously disputed. The very fact that the men all gathered at the time clock at exactly 11:22 a.m. and waited until exactly 11:24 a.m. to punch out exactly 5 hours from the beginning of the shift was enough, without more, to establish the fact that the action was concerted."

¹⁰ This rule is also enunciated in *Rossmore House*, 269 NLRB 1176 (1984), rejecting a per se rule regarding questioning employees about their union sympathies, particularly when they openly support unionization.

Moreover, Howard may well have thought that an affirmative answer to the question about discussions amongst the 3 would get him and/or Cleckler and Yarbrough into trouble. This is relevant not only to the question of whether the questioning was coercive but also my conclusion that Howard's answer is not a basis for discrediting Yarbrough's testimony to the contrary. Cleckler's evasiveness in answering the question is also evidence of its coercive nature.

In sum I find the inquiry into the discussions between the discriminatees was coercive and that Respondent, by Gomez, violated Section 8(a)(1) in making that inquiry, *E.B. Malone, Corp.*, 273 NLRB 78, 81 (1984).¹¹

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act in discharging Justin Cleckler, Nathan Yarbrough, and Nathan Howard.

2. Respondent, by "Toby" Brooks, did not violate the Act or threaten Nathan Howard as alleged.

3. Respondent, by Gregory Gomez, violated the Act by unlawfully interrogating Justin Cleckler, Nathan Yarbrough, and Nathan Howard.

REMEDY

The Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate these employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, computed as described above.

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, Hyundai Motor Manufacturing Alabama,

¹¹ At p. 46 of its brief, Respondent states that the charge does not contain any details about alleged interrogations and that Respondent can only guess that the General Counsel is referring to the conversations of Gomez and Brooks with the discriminatees. The second amended charge, filed on May 25, 2016, alleges that on December 23, 2015, Respondent, through Gregory Gomez, interrogated employees about their protected concerted activities. The complaint repeats this allegation in par. 7.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

LLC, Montgomery, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

(b) Interrogating employees concerning their communications regarding protected subjects.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Justin Cleckler, Nathan Howard, and Nathan Yarbrough full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Justin Cleckler, Nathan Howard and Nathan Yarbrough whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Justin Cleckler, Nathan Howard, and Nathan Yarbrough for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Compensate these employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and within 3 days thereafter notify Justin Cleckler, Nathan Howard, and Nathan Yarbrough in writing that this has been done and that the discharge will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Montgomery, Alabama facility copies of the attached notice marked "Appendix".¹³ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 11, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 6, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activity, including protesting or complaining about your wages, hours, and/or other terms and conditions of your employment.

WE WILL NOT question you about communications with other employees about protected subjects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Justin Cleckler, Nathan Yarbrough, and Nathan Howard full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Justin Cleckler, Nathan Yarbrough, and Nathan Howard whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Justin Cleckler, Nathan Yarbrough, and Nathan Howard for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Justin Cleckler, Nathan Yarbrough, and Nathan Howard for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Justin Cleckler, Nathan Yarbrough, and Nathan Howard and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

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The Administrative Law Judge's decision can be found at www.nlrb.gov/case/17-CA-173149 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

